

**Southwest Community Health Services d/b/a Albuquerque Ambulance Service and UBC Southwestern Council of Industrial Workers, AFL-CIO. Case 28-CA-6731**

July 30, 1982

**DECISION AND ORDER**

**BY MEMBERS FANNING, JENKINS, AND  
ZIMMERMAN**

Upon a charge filed on November 24, 1981, by UBC Southwestern Council of Industrial Workers, AFL-CIO, herein called the Union, and duly served on Southwest Community Health Services d/b/a Albuquerque Ambulance Service, herein called Respondent, the General Counsel of the National Labor Relations Board, by the Regional Director for Region 28, issued a complaint on December 2, 1981, against Respondent, alleging that Respondent had engaged in and was engaging in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the National Labor Relations Act, as amended. An amended complaint and notice of hearing issued on February 3, 1982. Copies of the charge, complaint and notice of hearing, and amended complaint and notice of hearing before an administrative law judge were duly served on the parties to this proceeding.

With respect to the unfair labor practices, the complaint alleges in substance that on November 10, 1981, following a Board election in Case 28-RC-3949,<sup>1</sup> the Union was duly certified as the exclusive collective-bargaining representative of Respondent's employees in the unit found appropriate; and that, commencing on or about November 18, 1981, and at all times thereafter, Respondent has refused, and continues to date to refuse, to bargain collectively with the Union as the exclusive bargaining representative, although the Union has requested and is requesting it to do so. On December 9, 1981, and February 8, 1982, Respondent filed its answers to the complaint and amended complaint, respectively, admitting in part, and denying in part, the allegations in the complaint.

On March 8, 1982, counsel for the General Counsel filed directly with the Board a Motion for Summary Judgment. Subsequently, on March 11, 1982, the Board issued an order transferring the

proceeding to the Board and a Notice To Show Cause why the General Counsel's Motion for Summary Judgment should not be granted. Respondent thereafter filed a response and supplemental response to the Notice To Show Cause and a motion for reconsideration of issues presented in Case 28-RC-3949.<sup>2</sup>

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Upon the entire record in this proceeding, the Board makes the following:

**Ruling on the Motion for Summary Judgment**

In its answer to the complaint and in its opposition to the Motion for Summary Judgment, Respondent admits that it has refused to bargain with the Union but denies that it has thereby violated the Act. Respondent requests that the Board reconsider its decision to deny review in Case 28-RC-3949 because the Board failed to consider the record presented to the Regional Director in connection with his unit determination, because of the intervening development in the law as reflected by *Presbyterian/St. Luke's Medical Center v. N.L.R.B.*, 653 F.2d 450 (10th Cir. 1981), and because of the hearing transcript in *North Memorial Medical Center*, 224 NLRB 218 (1976), which Respondent contends is newly discovered evidence. Further, Respondent contends that the Regional Director's decision in the instant case conflicts with the Board's decision in *North Memorial Medical Center*. Further, in its supplemental response to the Notice To Show Cause, Respondent argues that the Regional Director's decision in Case 28-RC-3949 conflicts with two recent decisions by the Regional Director for Region 17.

The General Counsel contends that Respondent improperly seeks to litigate issues which were or could have been litigated in the underlying representation proceeding or which have no merit. We agree with the General Counsel.

A review of the record herein, including that of the representation proceeding in Case 28-RC-3949, establishes that a petition was filed by the Union on January 23, 1981, seeking an election among a unit of Respondent's employees. The Union filed an amended petition on January 30, 1981, and a second amended petition on February 13, 1981. On April 1, 1981, the Regional Director for Region 28 issued his Decision and Direction of Election, in

<sup>1</sup> Official notice is taken of the record in the representation proceeding, Case 28-RC-3949, as the term "record" is defined in Secs. 102.68 and 102.69(g) of the Board's Rules and Regulations, Series 8, as amended. See *LTV Electrosystems, Inc.*, 166 NLRB 938 (1967), enfd. 388 F.2d 683 (4th Cir. 1968); *Golden Age Beverage Co.*, 167 NLRB 151 (1967), enfd. 415 F.2d 26 (5th Cir. 1969); *Intertype Co. v. Penello*, 269 F.Supp. 573 (D.C.Va. 1967); *Follett Corp.*, 164 NLRB 378 (1967), enfd. 397 F.2d 91 (7th Cir. 1968); Sec. 9(d) of the NLRA, as amended.

<sup>2</sup> We hereby deny Respondent's request for oral argument as the record and the briefs adequately present the issues and the positions of the parties.

which he found the appropriate unit to be all full-time and regular part-time paramedics, emergency medical technicians, emergency vehicle operators, patient transfer operators, and dispatchers, employed at the Employer's ambulance service in Albuquerque, New Mexico; excluding all other employees, the lead mechanic, mechanics, the equipment and supply manager, the receptionist, and guards and supervisors as defined in the Act.

Thereafter, on April 17, 1981, Respondent filed with the Board a request for review, asserting that the Regional Director erred in concluding that a separate unit composed of ambulance service employees was appropriate. On April 28, 1981, the Regional Director conducted a secret-ballot election, the ballots of which were impounded pending a decision by the Board of Respondent's request for review. On October 23, 1981, the Board denied the request for review. On November 2, 1981, the ballots were counted and the Union received a majority of the votes cast. On November 10, 1981, the Regional Director issued his Certification of Representative certifying the Union as the exclusive bargaining representative in the unit found appropriate.<sup>3</sup> Since November 18, 1981, Respondent has refused to bargain with the Union. Pursuant to a charge filed by the Union on November 24, 1981, the Regional Director issued a complaint on December 2, 1981, alleging violation of Section 8(a)(1) and (5) of the Act.

As mentioned above, Respondent advances three grounds why the Board should reconsider Respondent's request for review. First, Respondent asserts that the Board improperly failed to have before it the record presented to the Regional Director in connection with his determination that the ambulance service employees constitute an appropriate unit. We find that Respondent's failure timely to raise this issue in the representation proceeding constitutes a waiver which precludes it from relying on the Board's failure to consider the record as a defense to its refusal to bargain.<sup>4</sup> In any event, under Section 102.67(d) of the Board's Rules and Regulations, Series 8, as amended, "any request for review must be a self-contained document enabling the Board to rule on the basis of its contents without the necessity of recourse to the record." Accordingly, we find no merit to Respondent's contention that the Board's failure to

consider the record deprived Respondent of its opportunity to obtain proper review of the Regional Director's decision.

In addition, Respondent contends that, contrary to the Tenth Circuit's directive in *Presbyterian/St. Luke's Medical Center, supra*, the Regional Director failed to specify the manner in which his unit determination "implemented or reflected" the congressional admonition against undue proliferation of bargaining units in health care institutions. Regardless of whether the court's decision in *Presbyterian/St. Luke's Medical Center* has any applicability to the representation proceedings here, it is clear that the Regional Director made the specific finding that Respondent asserts is required. Thus, after concluding that the ambulance service employees share a separate and distinct community of interest, the Regional Director set forth four reasons why finding such a unit appropriate does not violate the congressional admonition. Those reasons are as follows: First, "Albuquerque Ambulance Service is essentially involved in providing a service which is separate and apart from operations traditionally associated with the services provided by a hospital or health care institution." Second, "the purposes and functions of the ambulance service are not directly related to the common health care purposes for which any hospital exists or the traditional health care functions which any hospital performs." Third, "the ambulance crew members have the same relationship and work contact with the emergency room personnel at other hospitals as they have with such personnel at the Presbyterian Hospital emergency room." Fourth, "based upon the number of patients transported to the various hospitals in Albuquerque, during the only period for which there is data, Albuquerque Ambulance Service crew work contact with hospital personnel occurred more frequently at area hospitals other than Presbyterian Hospital. In fact, less than 30 percent of the total patient deliveries during that period were to Presbyterian Hospital." Consequently, we conclude that there is no merit to Respondent's second contention. Lastly, Respondent asserts that the *North Memorial Medical Center* hearing transcript was unavailable to it at the time of the hearing and at the time of its request for review and this transcript provides further evidence that the Regional Director's decision in the instant case conflicts with the Board's decision in *North Memorial Medical Center*. We disagree. Respondent could have received a copy of the *North Memorial Medical Center* hearing transcript simply by filing a request for information with the Board. Further, each fact Respondent discusses was available in the majority or dissenting *North Memorial*

<sup>3</sup> On January 6, 1982, the Union and Respondent jointly filed a petition in Case 28-AC-34 seeking to amend the certification in Case 28-RC-3949 to reflect Respondent's name change from Presbyterian Hospital Center d/b/a Albuquerque Ambulance Service to Southwest Community Health Services d/b/a Albuquerque Ambulance Service. On January 28, 1982, the Regional Director for Region 28 issued his Decision and Amendment of Certification making the requested name change.

<sup>4</sup> See *Fall River Savings Bank*, 250 NLRB 935, 936, fn. 12 (1980), *enfd.* 649 F.2d 50 (1st Cir. 1981).

*Medical Center Board opinion, to which Respondent clearly had access.*

It is well settled that in the absence of newly discovered or previously unavailable evidence or special circumstances a respondent in a proceeding alleging a violation of Section 8(a)(5) is not entitled to relitigate issues which were or could have been litigated in a prior representation proceeding.<sup>5</sup>

All issues raised by Respondent in this proceeding were or could have been litigated in the prior representation proceeding, or, as we have found above, have no merit, and Respondent does not offer to adduce at a hearing any newly discovered or previously unavailable evidence, nor does it allege that any special circumstances exist herein which would require the Board to reexamine the decision made in the representation proceeding. We therefore find that Respondent has not raised any issue which is properly litigable in this unfair labor practice proceeding. Accordingly, we grant the Motion for Summary Judgment.

On the basis of the entire record, the Board makes the following:

#### FINDINGS OF FACT

##### I. THE BUSINESS OF RESPONDENT

Respondent, a corporation which has maintained and operated health care facilities in the State of New Mexico, has been engaged in the nonprofit delivery of health care services, including ambulance services. Respondent's ambulance service in Albuquerque, New Mexico, is the only facility involved in this proceeding. During the past 12 months, a representative period, Respondent, in the course and conduct of its business operations derived gross revenues therefrom in excess of \$250,000. In addition Respondent, during the same 12-month period purchased goods and materials valued in excess of \$50,000 and caused the same to be transported in interstate commerce and delivered to its Albuquerque, New Mexico, place of business directly from points outside the State of New Mexico.

We find, on the basis of the foregoing, that Respondent is, and has been at all times material herein, an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act, and that it will effectuate the policies of the Act to assert jurisdiction herein.

<sup>5</sup> See *Pittsburgh Plate Glass Co. v. N.L.R.B.*, 313 U.S. 146, 162 (1941); Rules and Regulations of the Board, Secs. 102.67(f) and 102.69(c).

##### II. THE LABOR ORGANIZATION INVOLVED

UBC Southwestern Council of Industrial Workers, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

##### III. THE UNFAIR LABOR PRACTICES

###### A. *The Representation Proceeding*

###### 1. The unit

The following employees of Respondent constitute a unit appropriate for collective-bargaining purposes within the meaning of Section 9(b) of the Act:

All full-time and regular part-time paramedics, emergency medical technicians, emergency vehicle operators, patient transfer operators, and dispatchers, employed at the Respondent's ambulance service in Albuquerque, New Mexico; excluding all other employees, the lead mechanic, mechanics, the equipment and supply manager, the receptionist, and guards and supervisors as defined in the Act.

###### 2. The certification

On April 28, 1981, a majority of the employees of Respondent in said unit, in a secret-ballot election conducted under the supervision of the Regional Director for Region 28 designated the Union as their representative for the purpose of collective bargaining with Respondent.

The Union was certified as the collective-bargaining representative of the employees in said unit on November 10, 1981, and the Union continues to be such exclusive representative within the meaning of Section 9(a) of the Act.

###### B. *The Request To Bargain and Respondent's Refusal*

Commencing on or about November 10, 1981, and at all times thereafter, the Union has requested Respondent to bargain collectively with it as the exclusive collective-bargaining representative of all the employees in the above-described unit. Commencing on or about November 18, 1981, and continuing at all times thereafter to date, Respondent has refused, and continues to refuse, to recognize and bargain with the Union as the exclusive representative for collective bargaining of all employees in said unit.

Accordingly, we find that Respondent has, since November 18, 1981, and at all times thereafter, refused to bargain collectively with the Union as the exclusive representative of the employees in the appropriate unit, and that, by such refusal, Respond-

ent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act.

#### IV. THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

The activities of Respondent, set forth in section III, above, occurring in connection with its operations described in section I, above, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

#### V. THE REMEDY

Having found that Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act, we shall order that it cease and desist therefrom, and, upon request, bargain collectively with the Union as the exclusive representative of all employees in the appropriate unit and, if an understanding is reached, embody such understanding in a signed agreement.

In order to ensure that the employees in the appropriate unit will be accorded the services of their selected bargaining agent for the period provided by law, we shall construe the initial period of certification as beginning on the date Respondent commences to bargain in good faith with the Union as the recognized bargaining representative in the appropriate unit. See *Mar-Jac Poultry Company, Inc.*, 136 NLRB 785 (1962); *Commerce Company d/b/a Lamar Hotel*, 140 NLRB 226, 229 (1962), *enfd.* 328 F.2d 600 (5th Cir. 1964), *cert. denied* 379 U.S. 817; *Burnett Construction Company*, 149 NLRB 1419, 1421 (1964), *enfd.* 350 F.2d 57 (10th Cir. 1965).

The Board, upon the basis of the foregoing facts and the entire record, makes the following:

#### CONCLUSIONS OF LAW

1. Southwest Community Health Services d/b/a Albuquerque Ambulance Service is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. UBC Southwestern Council of Industrial Workers, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

3. All full-time and regular part-time paramedics, emergency medical technicians, emergency vehicle operators, patient transfer operators, and dispatchers, employed at the Respondent's ambulance service in Albuquerque, New Mexico; excluding all other employees, the lead mechanic, mechanics, the equipment and supply manager, the receptionist,

and guards and supervisors as defined in the Act, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

4. Since November 10, 1981, the above-named labor organization has been and now is the certified and exclusive representative of all employees in the aforesaid appropriate unit for the purpose of collective bargaining within the meaning of Section 9(a) of the Act.

5. By refusing on or about November 18, 1981, and at all times thereafter, to bargain collectively with the above-named labor organization as the exclusive bargaining representative of all the employees of Respondent in the appropriate unit, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) of the Act.

6. By the aforesaid refusal to bargain, Respondent has interfered with, restrained, and coerced, and is interfering with, restraining, and coercing, employees in the exercise of the rights guaranteed them in Section 7 of the Act, and thereby has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

7. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

#### ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, Southwest Community Health Services d/b/a Albuquerque Ambulance Service, Albuquerque, New Mexico, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to bargain collectively concerning rates of pay, wages, hours, and other terms and conditions of employment with UBC Southwestern Council of Industrial Workers, AFL-CIO, as the exclusive bargaining representative of its employees in the following appropriate unit:

All full-time and regular part-time paramedics, emergency medical technicians, emergency vehicle operators, patient transfer operators, and dispatchers, employed at the Respondent's ambulance service in Albuquerque, New Mexico; excluding all other employees, the lead mechanic, mechanics, the equipment and supply manager, the receptionist, and guards and supervisors as defined in the Act.

(b) In any like or related manner interfering with, restraining, or coercing employees in the ex-

ercise of the rights guaranteed them in Section 7 of the Act.

2. Take the following affirmative action which the Board finds will effectuate the policies of the Act:

(a) Upon request, bargain with the above-named labor organization as the exclusive representative of all employees in the aforesaid appropriate unit with respect to rates of pay, wages, hours, and other terms and conditions of employment and, if an understanding is reached, embody such understanding in a signed agreement.

(b) Post at its facility in Albuquerque, New Mexico, copies of the attached notice marked "Appendix."<sup>6</sup> Copies of said notice, on forms provided by the Regional Director for Region 28, after being duly signed by Respondent's representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure that said notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director for Region 28, in writing, within 20 days from the date of this Order, what steps have been taken to comply herewith.

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<sup>6</sup> In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

## APPENDIX

NOTICE TO EMPLOYEES  
POSTED BY ORDER OF THE  
NATIONAL LABOR RELATIONS BOARD  
An Agency of the United States Government

WE WILL NOT refuse to bargain collectively concerning rates of pay, wages, hours, and other terms and conditions of employment with UBC Southwestern Council of Industrial Workers, AFL-CIO, as the exclusive representative of the employees in the bargaining unit described below.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL, upon request, bargain with the above-named Union, as the exclusive representative of all employees in the bargaining unit described below, with respect to rates of pay, wages, hours, and other terms and conditions of employment and, if an understanding is reached, embody such understanding in a signed agreement. The bargaining unit is:

All full-time and regular part-time paramedics, emergency medical technicians, emergency vehicle operators, patient transfer operators, and dispatchers, employed at our ambulance service in Albuquerque, New Mexico; excluding all other employees, the lead mechanic, mechanics, the equipment and supply manager, the receptionist, and guards and supervisors as defined in the Act.

SOUTHWEST COMMUNITY HEALTH  
SERVICES D/B/A ALBUQUERQUE AM-  
BULANCE SERVICE